United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

76-1042

B P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA :

Appellee, :

-against- : Docket No. 76-1042

WALTER SINTSCHA :

Appellant. :

- X

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT OF
THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

DARNELL BLACKETT, ESQ.
Attorney for Appellant
401 Broadway
New York, New York

TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- X

UNITED STATES OF AMERICA :

Appellee :

-against- :

WALTER SINTSCHA :

Appellant :

- X

BRIEF FOR APPELLANT

QUESTIONS PRESENTED

1. Whether the trial Judge impermissibly commented on the evidence in his charge to the jury, thus, in effect, directing a verdict or negating appellant's defense.

2. Whether the trial court's charge on entrapment erroneously required appellant to meet a burden of proof which was not his to carry.

3. Whether the trial court's charge on the Government's use of informants was not prejudicially erroneous, confusing when juxtapose to such instruction on entrapment as was given and in effect cancelled out its entrapment charge.

4. Whether appellant's objection to the court's prejudicial comment on the government's policy in the use of informant was timely or otherwise preserved by Rule 52 of the Federal Rules of Criminal Procedure.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This appeal is from a judgment of the United States District Court for the Southern District of New York, by Honorable Milton Pollack, rendered after a jury trial convicting appellant Walter Sintscha for possessing with intent to distribute, conspiring to distribute and distributing cocaine in violation of Title 21 United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), entered January 30, 1976. Appellant was sentenced to 5 years imprisonment on each of six counts of the indictment, the terms to run concurrently; and pursuant to provision T21 Section 841 U.S. code, is placed on Special Parole for a period of 3 years to commence upon expiration of his confinement.

Statement of Fact

Appellant Walter Sintscha was indicted on September 25, 1975 in the Southern District of New York on charges of possessing with intent to distribute and distributing 6.5 grams of cocaine on July 10, 1975; distributing and possessing with intent to distribute 28.0 grams of cocaine July 23, 1975; distributing and possessing with intent to distribut 98.5 grams of cocaine, July 25, 1975; distributing and possessing with intent to distribute two ounces of cocaine, August 7, 1975; of

distributing and possessing with intent to distribute one-quarter of an ounce of cocaine, September 10, 1975, and that his distribution and possession with intent to distribute the (Schedule I and II) narcotic drug controlled substance was effected in combination, conspiracy, confederation and agreement with five other defendants* all in violation of Title 21, United States Code, Section 812, 841(a)(1) and 841(b)(1)(A). Appellant and his co-defendants, with the exception of Armando Delbarrio and Paula Delbarrio, were tried together before the Honorable Milton Pollack and a jury, commencing December 5, 1975. At the close of the evidence and judge's charge the appellant was found guilty of cocaine distribution and possession of the same with intent to distribute July 10, 23 and 25, 1975 and August 7 and September 10, 1975 as well as conspiracy to engage in those acts in violation of Title 21.

On January 30, 1976 appellant's sentence committed him to the custody of the Attorney General or his authorized representative, for concurrent term of 5 years and, pursuant to Section 841, Title 21 United States Code, placed on special parole for a term of three years, to commence on expiration of

---

*Edward Montiell a/k/a "Carlos"
Rubin Lopez a/k/a "John"
Fernando Padron
Armando Delbarrio a/k/a "Al"
Paula Delbarrio

confinement.

The Trial

The Government's case was based upon the testimony of an undercover agent and a surveillance team of ten officers (not all of whom testified) which through its superior pressured a drug addict into luring defendant away from legitimate employment and into drug transaction. Appellant's defense was that of entrapment.

A. The Government's case

"Pat", a drug addict (p. 102)*against whom another crime had been charged and the trial of whose case was then pending in the Southern District, under the twin influence of promises to intercede on her behalf in court in obtaining favorable consideration of her case and the direct payment to her of a sum of money, was pressed into service by the government after the dismissal of her first case (P. 103) and prior to her arranged contact with appellant for the purpose of inducing him to transact a sale of cocaine to one of its agents in violation of the United States Drug Law. The scheme was undertaken by the Government with knowledge that appellant was then employed by the Metropolitan Life Insurance Company at White Plains, New York (102-110, 119, 236-237, 298, 307-308, 340-343).

*All numerals are references to minutes of trial.

On July 10, 1975 "Pat" took the undercover agent to the appellant to accomplish the purpose for which she was hired. He was not then at his apartment but they waited some 15 minutes until he returned (P.137). Another version states that "Pat" (alone) entered the building where appellant lived, remained therein 5 minutes, emerged and entered the car in which the undercover agent was waiting, later to be followed by the appellant who drove away with them (298). No detail of the conversation that took place in the car was offered except it was stated that appellant "informed (the undercover agent) that he had a quarter of an ounce of cocaine to sell for $475. "He did not have it at the time but would get it in approximately 15 minutes." (138) Thereafter, on the said date, at appellant's apartment appellant "handed the undercover agent a brown manila envelope ...containing white powder" which he tested with a match and tinfoil... and told appellant he would purchase it for the $475. They went down to the car, Appellant entered it, the undercover agent remove $475 from the trunk of the car handed it to appellant, picked up "Pat" and left the area (139-140). On July 23, 1975 in near identical fashion with July 10th account, the undercover agent and appellant exchanged money and cocaine (145-148). On July 24, 1975 appellant promised the undercover agent he would have cocaine for him in Queens, quoting

a price of $3500 at the time. On July 25, 1975 they met and in the company of Fernando Padron went to Queens where the undercover agent and one Delbarrio exchanged a quantity of cocaine for money, in the presence of appellant and Padron (150-155). On August 7, 1975, at appellant's apartment in Manhattan, Lopez came in ..."handed(appellant) two plastic bags containing white powder" which the undercover agent "field tested and found it to be of positive result. (He) "then handed over $3000 to (appellant) who in turn gave to Mr. Lopez." (163-164). On September 10, 1975 at appellant's apartment, appellant gave the undercover agent "a small plastic bag containing white powder which he said was "a quarter." The undercover agent "checked out the powder" and told appellant he "would buy it and to come out to the car" and he would "give him the bread." No discussion of money equivalent was stated. When appellant got to the car he was placed under arrest. (172-173) Another version has it that the undercover agent did not take the"stuff" from appellant September 10, 1975 (229). Still another version had it that Special Agent Bradley took the cocaine from the appellant September 10, 1975 (377).

B. The Defense Case

At the time the government undertook to make appellant a possessor and distributor of a controlled narcotic druge he was employed at White Plains, New York by Metropolitan Life Insurance Company and known by the government to be so employed. During the while he resided in Manhattan (109-110). His employment by Metropolitan Life Insurance Company continued until shortly before his arrest September 10, 1975 (340-343).

That until July 10, 1975, the day "Pat" introduced him to Appellant, the undercover agent did not know appellant (236, 106-110).

At no time during the entire surveillance with respect to appellant was he seen by an observer of the surveillance team to have given or received a controlled substance or anything else from the undercover agent of the team though testimoney was given to the effect that money and the stuff was, at times, passed in the "streets." (237, 239) At no time during the entire surveillance with respect to appellant was conversation of any kind between the undercover agent and appellant heard by another member of the surveillance team though, at times, the undercover agent was close enough to a member of the team for direct communication (148).

Every telephone conversation betweeen the undercover agent and appellant was initiated by the undercover agent

except two concerning which the undercover agent asked appellant to call him (237?) Appellant offered no direct oral testimony.

Appellant request was made as follows:

The following request is supplemental to defendant's requests earlier submitted.

> It is never permissible for the government through its officers or agents to initiate the criminal act, nor tc entice or induce a defendant to commit a crime, when without such enticement or inducement the defendant would not have committed such crime. A defendant cannot be convicted of a crime which was provoked or induced by a government agent or officer and which would not otherwise have been committed.
>
> Di Salvo v. United States, 2 F2d 222.

C. Request to Charge and Instruction to the Jury

With respect to the charge concerning appelllant the instruction went as follows:

.....Now, there has been testimony before you with respect to the use by the narcotic agents of the services of an informant or an informer. Whatever you think of informers, the government uses them in order to get leads to those who

are violating the law, and this is entirely proper. Whether you and I disapprove of that really is beside the point, provided that such services in no wise infringe upon the rights of the defendant, because the use of such services is not forbidden by law. You are not being asked to determine whether or not you agree with the policy endorsing the use of informants.

Putting it another way, if you are satisfied beyond a reasonable doubt, as I have already defined reasonable doubt to you, that the defendants committed the offenses as charged in the indictment, you may find them guilty, even though you believe their apprehension came about in some measure by the government availing itself of the services of an informant.

Defense counsel has urged a defense of entrapment and it has been mentioned in the summations, and I will now advise you as to what that term of law means and what it does not mean. The fact that I instruct you on this subject does not mean that I believe there is any evidence to sustain such an offense. I give you the instruction as the legal guide on the subject. You will have to say what the facts and circumstances in evidence add up to.

Entrapment exists only when a government agent or agents induce and originate the commission of a crime without the aid of any prior criminal intent or purpose on the part of the defendant. There is no entrapment when the criminal intent or

purpose is already present and the agent or agents merely afford the opportunity for the commission of the crime and seek to apprehend the perpetrator. When the criminal design originates with officials of the government and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission by solicitation, proposition, suggestion or the like in order that they might prosecute, the defense of entrapment arises.

However, you must bear in mind, and I instruct you as a matter of law, that it is a valid reply to a contention of entrapment if the government has satisfied you beyond a reasonable doubt that the defendant was ready and willing to commit the offense charged and was awaiting any propitious opportunity to commit the offense when such an opportunity was afforded by government officials. You must be satisfied beyond a reasonable doubt that the government did not seduce an otherwise innocent person, but only provided the means for the accused to realize a pre-existing purpose.

The evidence shows that on several occasions Detective Caracappa discussed narcotics with Walter Sintscha and these conversations were taped with a recording device. Just in case you might have some doubts on this subject, I am instructing you that the use of such a device in the manner described in this case is entirely within the law and violates no one's

rights. This is so essentially because Detective Caracappa, who was a participant in the conversation, was entitled by law to record his own telephone talks with or without the knowledge of the other party to the phone talk. Accordingly, the use of these devises was a proper investigative technique. This is not what you may have read about as wiretappeing that is not permitted except on proper legal authorization and court order. No court order is needed to record your own talks anymore than if your own secretary was taking it down when it occurred."

On returning from lunch at 2:15 P.M.,pursuant to the Court's direction, appellant offered objection to what he understood to be conflicting charge,and the colloquy between Court and appellant's counsel went as follows:

(Jury note at 3:10 p.m.)

(In open court - jury not present)

THE COURT: This request that I have seen a couple of hours after the jury started deliberating, what does this mean?

MR. BLACKETT: I feel, your Honor, and I really didn't think about it until lunch, that the statement you made to the jury that the government usually uses informants to do the kind of thing this girl Pat did -

THE COURT: Most unusual after the jury went out. The

jury went out at eleven this morning and here you hand me a note, which catches up with me at 3:15, although you date it at 2:15. Regardless of that fact you say three hours after the jury commences its deliberation you want me to tell the jury something.

MR. BLACKETT: Your Honor, that is permissible.

THE COURT: I know it is permissible and also I can ignore it.

MR BLACKETT: You can instruct the jury even after it's gone out to deliberate.

THE COURT: The note is marked Court's Exhibit 20. I decline to deal with any aspect of the charge at this late point.

ARGUMENT

POINT I

THE TRIAL COURT'S COMMENTS ON THE POLICY OF THE GOVERNMENT IN ITS USE OF INFORMANTS TO GET LEADS TO THOSE WHO ARE VIOLATING THE LAW AND THE PROPRIETY OF THE POLICY DEALT WITH MATTERS NOT IN EVIDENCE AND ERRONEOUSLY RESTRICTED THE JURY'S CONSIDERATION OF THAT EVIDENCE, AS WELL AS GAVE A SOMEWHAT DISTORTED PICTURE OF THE PROBLEM WHICH THE JURY HAD TO RESOLVE.

Appellant Walter Sintscha's guilt was predicated on a scheme conceived, put in motion and affected by the government with the assistance of a drug addict whose remuneration for her services was a promise to intercede on her behalf in a criminal (drug) action then pending against her and a sum of money. The inducement of appellant by the government being clearly evident from the testimony on the trial, the court was required to submit not merely explanation of but instructions on the law of entrapment to the jury, inasmuch as the evidence indicated that appellant was not the "ready and willing" person who without persuasion "awaited a propitious opportunity to commit the offense" with which he was charged, even in the face of unsuspecting recordings of telephone conversations in which the government maintained control in total. The Drug Enforcement Administration went to appellant with all the

cunning and contrivance its experience could muster, drinks, lunches, telephone calls, even the casing of appellant in legitimate work pursuit, long before it decided to set him up. United States v. Riley 363 F2d 955 (2d Cir. 1966). Appellant requested an entrapment charge on the authority of DiSalvo v. United States, 2 F2d 222.

Immediately before charging the jury on "what that term (entrapment) of the law means and what it does not mean..." the court instructed the jury that "whatever (it) thought of informers, the government uses them in order to get leads to those who are violating the law and this is entirely proper. Whether you and I disapprove of that really is beside the point ...." and again "...you may find them guilty, even though you believe their apprehension came about in some measure by the government availing itself of the services of an informant." The comment was an unwarranted assumption, there being nothing in the evidence to support it as a policy of the government. It was prejudicially erroneous since it deprived appellant of his only defense and further it limited the inference which appellant was entitled to draw and to have the jury draw from the evidence in appellant's closing argument, to the effect that "Pat" was more than a mere informant - and a cause and effect, in the charges instituted against appellant. United States v. Brandon, 479 F2d 830 (8th Cir. 1973), held, where the essential

element of intent is in dispute the defendant is just as effectively prejudiced whether the court states to the jury that the defendant is "guilty", or if it states that the government has established the disputed element of intent beyond a reasonable douht. And further along, where the issue of intent was disputed in cross-examination by defendant charged with a crime, prejudice to defendant by comments of trial judge, whose statement to jury made it clear that in the judge's opinion the United States had produced proof beyond a reasonable dount of the existence of... the...essentials of the offense, was not cured by trial judges instructions to the jury that they were the sole judges of the facts and that they must determine whether there was an intent to commit the crime beyond a reasonable doubt. 18 U.S.C.A. §1341

United States v. DeLoach Sr.,504 F2d 185 (D.C. Cir) ruled that in every criminal case defense counsel should have wide latitude in drawing inferences from the record. The right is infringed by court's adverse comments. To the same effect is United States v. Williams, 473 F2d 507 in summarizing its examination of several cases as follows: The underlying rationale of the decision in Womack, as well as in Garza, Dopf, Dillon and Lowry, is that when a court's charge could reasonably be construed as - or has the practical effect of -

directing a verdict of guilty, the charge exceeds the bounds of fair and impartial comment and is therefore, error (citing United States v. Wood, 458 F2 1351 (5th Cir. 1972).

POINT II

THE TRIAL COURT'S INSTRUCTION TO THE JURY ON THE GOVERNMENT'S POLICY CONCERNING THE USE OF INFORMANTS WHEN JUXTAPOSE TO ITS INSTRUCTION ON ENTRAPMENT HAD THE EFFECT OF CONFUSING THE JURY AND LEAVING IT WITH NO CHOICE OTHER THAN SUCH AS MIGHT BE DETERMINED BY THE COURT.

On entrapment, the court stated:

> The fact that I instruct you on this subject does not mean that I believe there is any evidence to sustain such an offense. I give you the instruction as a legal guide on the subject. You will have to say what the facts and circumstance in evidence add up to.
> (emphasis added)

DeLoach, supra is an authority for the rule that a:

> Trial judge may not impose on a jury his own notion of which inferences are reasonable from the evidence.

and United States v. Williams, 473 F2d 507 (5th Cir. 1973) for the rule:

> A trial court must be ever aware that the influence of trial judge on jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling.

United States v. DeLoach, 504 Fed. 2d 185 (App. DC 1974)

POINT III

JURY INSTRUCTIONS THAT CONSTITUTE OBVIOUS OR PLAIN ERROR OR THAT OTHERWISE SERIOUSLY AFFECT FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS ARE PRESERVED AGAINST FAILURE OF TIMELY OBJECTION BY COUNSEL.

Appellant's objection to the prejudicial charge, which like all other objections defense counsel deemed necessary, was required to be submitted in writing. On returning from lunch at the time directed and some two hours after the case was given to the jury, who also took the lunch break, appellant, according to procedure of the court wrote up the objection to the judge's charge on government informant and gave it to the clerk of the part at 2:15 p.m.. The clerk held the appellate written objection until the judge returned to the trial part.

The objection though tardy fell within the ambit of Rule 52(b) Federal Rules of Criminal Procedure since it was not only plain error but seriously affected the fairness of the trial of appellant, dealing as it did, with his only defense. United States v. O'Connor 237 F.2 466 (Cir.2d 1956) Federal Rules of Criminal Procedure, Rule 52(b).

United States Court of Appeals
For The Second Circuit

United States of America
appellee

against

Walter Sintscha
appellant

Docket No. 76-1042

I, Darnell J. Blackett, attorney of record for appellant in the above entitled appeal hereby affirm that on April 21, 1976 I served a copy of Walter Sintscha's brief upon Louis Freedman, Esq., attorney for appellant, Ruben Lopez, by leaving a copy thereof at said attorneys office, 120 Broadway, New York, New York: there being no one present therein at the time.

Dated: April 21, 1976

Darnell J. Blackett
DARNELL J. BLACKETT

CONCLUSION

FOR THE FOREGOING REASONS THE JUDGMENT OF THE DISTRICT COURT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR, IN THE ALTERNATIVE, FOR THE REASONS STATED IN POINTS I, II, AND III, A NEW TRIAL ORDERED.

Respectfully submitted,

DARNELL J. BLACKETT, ESQ.
Attorney for Appellant
Walter Sintscha
401 Broadway
New York, N.Y. 10013
(212) 925-3552

Copy received
The Legal Aid Society
Federal Appeals
4/21/76